Filed 7/26/19 In re G.C. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re G.C., a Person Coming Under the Juvenile Court Law.	H046054 (Monterey County Super. Ct. No. 18JV000565)
THE PEOPLE, Plaintiff and Respondent, v. G.C., Defendant and Appellant.	

The minor, G.C., was declared a ward of the juvenile court based on findings that he made criminal threats, committed battery, and carried out both offenses for the benefit of, at the direction of, or in association with, the Norteño criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. On appeal, the minor contends that the true findings on the gang allegations and on the criminal threats charge were unsupported by sufficient evidence. He also asserts an ineffective assistance of counsel claim and contends the juvenile court committed prejudicial evidentiary error. We shall affirm.

I. BACKGROUND

A. Factual Summary

We take the facts from the testimony at the contested jurisdictional hearing.

1. The Quinceañera

On May 26, 2018, the minor—then 17 years old—attended a quinceañera at a private ranch on San Juan Grade Road in Monterey County. Over 300 people attended the party which was staffed by seven or eight private security guards, six of whom were armed. A friend drove the minor and others, including Giovanni S., to the party.

On more than one occasion, the security guards confiscated alcohol from groups of underage people. Some of the security guards, including Brian T., became aware that an underage male—the minor—was intoxicated. The guards approached the minor and the 10 to 15 people with him, all of whom appeared to be underage. The guards told the group to leave. The minor reacted aggressively, yelling profanity at the guards telling them to get away from him. Brian tried to grab the minor, at which point the minor punched Brian in the face. Brian reacted by taking the minor to the ground. Another guard, Richard B., pepper-sprayed the minor. Brian used pepper spray on members of the crowd that he perceived as coming at him. Giovanni was among those pepper-sprayed.

The guards placed the minor in handcuffs and led him to the exit. When an SUV arrived to take the minor away, the guards removed his handcuffs. As they did so, he yelled threats at Brian and Richard, including saying that he knew who they were and where they lived, and that he was coming back. Four security guards heard the minor say "Norte," which they understood to be a gang reference. One of those security guards also heard the minor say "Northside," as did a fifth guard; they testified that they understood Northside to be a gang. As the cuffs came off, the minor tried to head bump Brian, who gave a warning shot with his taser in response.

Richard was wearing a GoPro camera during the quinceañera and recorded the incident with the minor. The footage from that camera was admitted into evidence. The minor can be seen punching a security guard in the face on the video. Later, as the guards prepare to remove the handcuffs, Richard repeatedly threatens to tase the minor if

he "make[s] a . . . move." The minor eventually responds by yelling profanity and a racial slur at Richard. While other guards remove the handcuffs, the minor can also be heard saying, apparently to Richard, "I know who . . . you are," followed by more profanity and slurs, and then "Norte motherfucker." The minor can then be seen interacting with other guards, but his words are not captured on the video. A guard can be heard repeatedly telling the minor's friends that "he's making verbal threats." After the handcuffs are removed, two of the minor's friends force him into a waiting SUV. As they do so, he continues to yell profanity and, at least initially, to resist their efforts.

The minor testified that he drank too much at the party; he estimated that he had eight or nine beers and some shots of tequila. He did not remember hitting a security guard, making threats, or saying Norte or Northside. He further testified that he did not know why he said the things he said to the guards.

There was a shooting at the party 45 minutes to an hour after the minor left. It is undisputed that the minor was not involved in that shooting. Jesse Pinon, a detective with the Monterey County Sheriff's Office, testified that he interviewed Giovanni. Over defense counsel's hearsay and confrontation clause objections, Pinon testified that Giovanni admitted that, in retaliation for the pepper-spraying incident, he had someone call "Chuchin" and tell him to come shoot the guards.

2. The Gang Evidence

Pinon testified as an expert on the Norteño criminal street gang. He testified that the Nuestra Familia prison gang "call[s] the shots for the Norteños on the streets," with the goal of "funneling money" to the Nuestra Familia. He testified that there are more than 3,000 Norteños and that they identify with the number 14, the color red, the letter N, and the word "Norte." He further testified that when a Norteño obtains money illegally, a portion of that money goes to the "prison gang" (i.e., the Nuestra Familia) and that there are "penalties"—specifically, fines—for failing to give the gang its cut. Pinon testified

that Norteños in Monterey County engage in battery, witness intimidation, narcotics sales, murder, and possession of firearms.

Pinon testified that there are geographically based subsets "that identify themselves as Norteños." The Norteño subsets in Salinas include the Santa Rita Boys, Northside Boronda, Northside Locos, and Salinas East Market. Of those, Pinon testified that the Santa Rita Boys, Northside Boronda, and Northside Locos all are considered Northside and are separate from the Salinas East Market subset. Pinon said that "at times" the subsets act as an integrated gang because members of different subsets know and associate with one another. He further testified that once gang members go to jail or prison, they "ignore the street alignment" (i.e., subsets), and "fight one battle" for "the Norteños and Nuestra Familia."

Pinon found a "reference" to a Norteño rapper on the minor's Facebook page. He did not recall seeing pictures of the minor wearing red or flashing gang signs on his Facebook page.

Pinon opined that by saying "Norte," the minor was claiming membership in the Norteño gang. He noted that there would be potentially violent consequences for someone who falsely claimed to be a Norteño. He further opined that claiming Norteño gang membership in front of a crowd while fighting with and verbally threatening security guards would benefit the gang by instilling fear in the public, thereby deterring people from reporting Norteño crimes. Pinon also opined that the minor associates with Norteños.

Detective Michael Smith of the Monterey County Sheriff's Office testified that he interviewed the minor in the days following the quinceañera. After Smith read the minor his *Miranda*[1] rights, the minor told Smith that he heard Giovanni say "Call Chuchin, we're going to kill these niggers," shortly after the party. The minor explained that he knew Chuchin because they had worked together two summers earlier; the minor thought

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

Chuchin was a Northsider. Chuchin had once let the minor hold his gun. The minor told Smith that he smoked marijuana with Chip, who also "hung out with Northsiders."

The minor testified that he did not think Giovanni was involved in gangs and ignored warnings from others to stay away from him. The minor denied knowing what "Northside" means. He testified that "Norte" is "gangster."

B. Procedural History

In June 2018, the Monterey County District Attorney filed a petition under Welfare and Institutions Code section 602, subdivision (a) alleging that the minor had made criminal threats (Pen. Code, § 422, subd. (a); count 1) and committed battery (*id*., § 242; count 2).[2] The petition included a section 186.22, subdivision (b)(1)(B) gang enhancement allegation as to count 1 and a section 186.22, subdivision (d) gang alternate penalty provision allegation as to count 2.

The juvenile court held a contested jurisdictional hearing over the course of four days in late June 2018. At the conclusion of the hearing, the court found that the charges and gang allegations were true. On July 13, 2018, the court declared the minor a ward of the juvenile court for a period of 24 months, ordered him to reside in the custody of his parents under the supervision of a probation officer, and ordered him to serve 43 days in Juvenile Hall with credit for 43 days served. The court also declared that the maximum time the minor could be confined was eight years eight months. The minor timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence Supporting the Gang Enhancement and the Alternate Penalty Provision

The minor challenges the sufficiency of the evidence supporting the section 186.22, subdivision (b)(1) gang sentence enhancement and section 186.22,

[2] All further statutory references are to the Penal Code unless otherwise indicated.

subdivision (d) alternate penalty provision.[3] Those provisions apply where the prosecution proves two things: (1) the underlying crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang" and (2) the underlying crime was committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."[4] (§ 186.22, subds. (b)(1) & (d).) We shall refer to the first prong as "the gang-related prong" and the second prong as "the specific intent prong." (*People v. Rios* (2013) 222 Cal.App.4th 542, 564 (*Rios*).) The minor argues that there was insufficient evidence as to the specific intent prong and the existence of a criminal street gang.

1. Standard of Review

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) The same substantial evidence standard of review applies to juvenile proceedings involving criminal acts. (*In re Cesar V.* (2011) 192 Cal.App.4th 989, 994 (*Cesar V.*).)

2. Evidence of Specific Intent

The minor argues that there was insufficient evidence as to the specific intent prong. We disagree. The minor called out "Norte" while threatening and struggling with the security guards. The gang expert testified that the word "Norte" refers to the Norteño

[3] The parties refer to both section 186.22, subdivision (b)(1) and section 186.22, subdivision (d) as enhancements. However, the California Supreme Court has held that section 186.22, subdivision (d) is an alternate penalty provision. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.)

[4] Section 186.22, subdivision (b)(1) applies to felonies; section 186.22, subdivision (d) applies to offenses punishable as felonies or misdemeanors.

gang and opined that invoking the gang's name in front of a crowd while fighting with and verbally threatening security guards would benefit the gang by instilling fear in the public and deterring them from reporting Norteño crimes. Indeed, in this case, it is difficult to conceive of any reason for the minor to have invoked the Norteño gang except to intimidate the guards to make them less likely to report gang crimes and thereby to assist future criminal conduct by gang members. Certainly, the juvenile court could reasonably have inferred from the evidence that the minor called out "Norte" to enhance that gang's violent reputation and thereby further future criminal conduct by his gang member friends. (See *Cesar V.*, *supra*, 192 Cal.App.4th at p. 1000 [finding sufficient evidence to support specific intent prong of section 186.22, subdivision (d) where defendants flashed gang signs while challenging rival gang members to a public fight]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109-110 [finding sufficient evidence to support specific intent prong of section 186.22, subdivision (b)(1) where defendant flashed gang signs to pedestrians and police during a high speed chase, reasoning that the "logical purpose was to accomplish the foreseeable effect: to proclaim the gang's dominance in the teeth of a determined police effort to enforce the law"].)

The minor contends that the prosecution was required to show that he intended to promote, further, or assist in *particular* criminal conduct by *specific gang members*. That argument finds no support in case law construing section 186.22, subdivisions (b)(1) and (d). California courts, including our Supreme Court, consistently have held that the specific intent prongs of section 186.22, subdivisions (b)(1) and (d) impose no "requirement that . . . the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing." (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 [construing subdivision (b)]; *Albillar*, *supra*, 51 Cal.4th at p. 66 [same, construing subdivision (b)]; *People v. Weddington* (2016) 246 Cal.App.4th 468, 485 [same, construing subdivision (b)]; *Cesar V.*, *supra*, 192 Cal.App.4th at p. 1000

[same, construing subdivision (d)].) Logic dictates that the subdivisions at issue do not require evidence showing the minor intended to assist specific gang members.

The minor's reliance on cases construing section 186.22, subdivision (a), which sets forth the substantive gang participation offense, is misplaced. "The elements of the gang participation offense in section 186.22[, subdivision] (a) are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).) Our Supreme Court has construed the third element of that offense "as requiring the promotion or furtherance of *specific conduct* of gang members and not inchoate future conduct." (*Id*. at p. 1137; see *People v. Castenada* (2000) 23 Cal.4th 743, 749 ["section 186.22[, subdivision] (a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22[, subdivision] (a) has also aided and abetted a separate felony offense committed by gang members"]; *id.* at pp. 750-751 ["section 186.22[, subdivision] (a) imposes criminal liability not for lawful association, but only when a defendant 'actively participates' in a criminal street gang while also aiding and abetting a felony offense committed by the gang's members"].)

The minor argues that the section 186.22, subdivision (b)(1) enhancement and the section 186.22, subdivision (d) alternate penalty provision at issue here contain "identical language" as section 186.22, subdivision (a), and thus should be construed identically. In fact, there are differences in the language of the subdivisions. Section 186.22, subdivision (a), criminalizes "willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang," where other elements also are satisfied. Subdivisions (b)(1) and (d), by contrast, require "the specific intent to promote,

further, or assist in any criminal conduct by gang members . . . ." Thus, as Justice Baxter noted in his *Rodriguez* concurrence, "Section 186.22[, subdivision] (b)(1)'s reference to promoting, furthering, or assisting gang members . . . merely describes a culpable *mental state*. By contrast, the gravamen of section 186.22[, subdivision] (a) is that the defendant's own criminal *conduct* must itself directly promote, further, or assist felonious criminal conduct by members of the gang." (*Rodriguez*, *supra*, 55 Cal.4th at p. 1141 (conc. opn. of Baxter, J.).) The "small but significant differences in grammar" between the subdivisions convinced Justice Baxter that the enhancement provision and the gang offense need not be construed "the same way." (*Id*. at pp. 1140-1141 (conc. opn. of Baxter, J.).)

The *Rodriguez* plurality likewise indicated that the enhancement provision and the substantive gang offense ought not be construed in the same manner. The plurality held that section 186.22, subdivision (a) cannot be violated by one who commits a felony alone. (*Rodriguez*, *supra*, 55 Cal.4th at p. 1128 (plur. opn. of Corrigan, J.).) For that conclusion, the plurality relied on the provision's use of the plural term "gang members" and the due process concerns raised by punishing mere gang membership. (*Id*. at pp. 1133-1135 (plur. opn. of Corrigan, J.).) By contrast, the plurality said that "[a] lone gang member who commits a felony" would be subject to "having that felony enhanced by section 186.22[, subdivision] (b)(1)," noting that the enhancement provision's requirements "that the [underlying] felony be gang related and that the defendant act with a specific intent to promote, further, or assist the gang, . . . provide a nexus to gang activity sufficient to alleviate due process concerns."[5] (*Id*. at pp. 1138-1139 (plur. opn. of

[5] We recognize that the court's "comments on section 186.22[, subdivision] (b)(1) in *Rodriguez* are dicta, [but] Supreme Court dicta generally should be followed, particularly where the comments reflect the court's considered reasoning. [Citation.]" (*Rios*, *supra*, 222 Cal.App.4th at p. 563.) And this court has since followed that dicta to hold that the section 186.22, subdivision (b)(1) gang enhancement may be applied to a lone actor. (*Rios*, *supra*, at p. 564.)

Corrigan, J.).) In sum, *Rodriguez* does not persuade us to adopt the minor's view that the specific intent prong of subdivisions (b)(1) and (d) require the prosecution to show intent to promote, further, or assist in *particular* criminal conduct by *specific gang members*.

The minor argues that our construction of the specific intent prong conflates it with the gang-related prong. Not so. The gang-related prong applies where the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang." One can easily conceive of a crime being committed at the direction of a criminal street gang but without any intent to promote, further, or assist in any criminal conduct by gang members. Imagine, for example, a non-gang member carrying out a crime at the direction of a criminal street gang in order to repay a debt to the gang with the sole intent of freeing himself or herself from that obligation. Such a crime would satisfy the gang-related prong of section 186.22, subdivisions (b)(1) and (d) but not the specific intent prong.

3. Evidence of a Criminal Street Gang

The minor next contends that the prosecution failed to prove the existence of a criminal street gang under section 186.22 and *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*).

a. Legal Principles

"Section 186.22 defines a 'criminal street gang' as 'any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission' of one or more certain enumerated offenses, 'having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.' (§ 186.22, subd. (f).) Subdivisions (e) and (j) of section 186.22 further define 'a pattern of gang activity' by the commission of certain predicate offenses by two or more persons on separate occasions within certain time periods." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 47 (*Pettie*).)

In *Prunty*, our Supreme Court considered "what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets." (*Prunty, supra,* 62 Cal.4th at p. 67.) The court "conclude[d] that where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[, subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Id*. at p. 71.) The court noted that the rule it described applies "where the prosecution's theory of why a criminal street gang exists turns on the conduct of one or more gang subsets . . . ." (*Ibid*., fn. 2.) More generally, the court stated that "the prosecution [must] introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang" (*id*. at p. 67) and that "the use of common colors and symbols" and "[e]vidence of a common viewpoint" are insufficient to "demonstrate the existence of a unified group." (*Id*. at p. 75.)

b. Analysis

The prosecution's theory was that the Norteño gang was the criminal street gang at issue for purposes of section 186.22. The gang expert testified that the minor associates with Norteños and committed his crimes for the benefit of that gang. The prosecution submitted evidence of predicate offenses committed by Norteño members for the benefit of that gang, not any subset. The gang expert testified to an organizational connection uniting Norteños—namely, that the Nuestra Familia prison gang "call[s] the shots for the Norteños on the streets," who are obligated to contribute money to the prison gang. The gang expert also noted the existence of Norteño subsets, but the prosecution did not demonstrate an associational or organizational connection uniting those subsets. According to the minor, by failing to show such a connection, the prosecution failed to prove the existence of a single "criminal street gang" for purposes of section 186.22.

This court rejected a similar argument in *Pettie*. There, "the prosecution's theory was that defendants were Norteños, not members of a subset gang. The prosecution's expert testified to the primary activities of the Norteño gang as a whole. [Citation.] And the predicate offenses were all committed by Norteño members for the benefit of that gang, not for the benefit of any subset gang. [Citation.]" (*Pettie, supra,* 16 Cal.App.5th at pp. 49-50.) The prosecution's gang expert also testified that Norteños may also identify with "geographically distinct cliques" or subsets. (*Id*. at p. 48; see *id*. at p. 37.) This court rejected the argument that the prosecution was required "to show some nexus between the Norteño gang and the cliques or subset gangs identified by" the expert where "neither the existence of these cliques nor the connections between them were necessary to prove the gang-related charges and allegations in this case." (*Id*. at pp. 49-50.) Likewise, here, *Prunty* did not obligate the prosecution to establish a connection between the subsets Pinon mentioned and the Norteño organization because "the prosecution's theory of [the existence of] a criminal street gang [did not] turn[] on the conduct of one or more gang subsets . . . ." (*Prunty*, *supra*, at p. 71, fn. 2.)

C. Ineffective Assistance of Counsel

At the close of the prosecutor's case, the minor's counsel moved to dismiss the gang enhancements under Welfare and Institutions Code section 701.1 on the ground that the prosecutor had failed to submit evidence of predicate offenses committed within three years of each other as required to establish the existence of a criminal street gang.[6] The

[6] The final element of the statutory definition of "criminal street gang" is that "members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) Section 186.22, subdivision (e), defines "pattern of gang activity" to mean "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of" predicate offenses, "provided at least one of these offenses occurred after the effective date of this chapter *and the last of those offenses occurred within three years after a prior offense*, and the offenses were committed on separate occasions, or by two or more persons." (Emphasis added.)

prosecutor then moved, successfully, to reopen the case in chief to submit evidence of another predicate offense. That evidence cured the defect and the minor's counsel withdrew her dismissal motion. On appeal, the minor asserts that his counsel was ineffective in moving to dismiss the gang enhancements and in specifying the basis for that motion, because doing so enabled the prosecutor to cure a defect in his case.

1. Legal Principles

a. Ineffective Assistance of Counsel

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).) Juveniles are likewise entitled to effective assistance of counsel. (*Johnny S. v. Superior Court* (1979) 90 Cal.App3d 826, 828.)

"Our review of counsel's performance is a deferential one. [Citation.] 'It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.]' [Citation.]" (*In re Jones* (1996) 13 Cal.4th 552, 561.)

"It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*Mai*, *supra*, 57 Cal.4th at p. 1009.)

b. Welfare and Institutions Code Section 701.1

Welfare and Institutions Code section 701.1 "provides that a minor's counsel may request, at the close of the People's case, that the court enter a judgment of dismissal."[7] (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 727.) Courts have held that Welfare and Institutions Code section 701.1 is substantially similar to Penal Code sections 1118 and 1118.1 and should be interpreted similarly. (*In re Man J.* (1983) 149 Cal.App.3d 475, 482.)

Section 1118 provides for acquittal motions in criminal court trials; section 1118.1 provides for acquittal motions when the criminal trial is by jury. Both "provide[] the defendant with the benefit of a procedure by which to move for acquittal when the prosecution fails to prove a prima facie case." (*People v. Belton* (1979) 23 Cal.3d 516,

[7] Welfare and Institutions Code section 701.1 states in full: "At the hearing, the court, on motion of the minor or on its own motion, shall order that the petition be dismissed and that the minor be discharged from any detention or restriction therefore ordered, after the presentation of evidence on behalf of the petitioner has been closed, if the court, upon weighing the evidence then before it, finds that the minor is not a person described by Section 601 or 602. If such a motion at the close of evidence offered by the petitioner is not granted, the minor may offer evidence without first having reserved that right." (Welf. & Inst. Code, § 701.1.)

521 (*Belton*).) "The purpose of [such motions] is to [allow] a defendant [to] promptly terminate a fatally deficient prosecution . . . ." (*People v. Riley* (2010) 185 Cal.App.4th 754, 766 (*Riley*).) A defendant is not required to "state specific grounds in support of the motion for acquittal" because such a requirement would afford "the prosecutor an opportunity to seek to reopen the case in order to cure such defects . . . ." (*Belton*, *supra*, at pp. 521-522.) "[F]ailure to bring a[n acquittal] motion at the close of the prosecution case waives any claim the evidence was at that point inadequate" (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1468), but not a sufficiency of the evidence claim based on the entire record (*id*. at p. 1469).

" 'The court always has discretion to allow the prosecution to reopen after [an acquittal] motion so long as the court is convinced that the failure to present evidence on the issue was a result of "inadvertence or mistake on the part of the prosecutor and not from an attempt to gain a tactical advantage over [the defendant]." [Citation.]' [Citation.]" (*Riley*, *supra*, 185 Cal.App.4th at pp. 764-765.)

2. Analysis

The minor argues that his counsel was deficient in moving to dismiss the gang enhancements at all, and particularly in specifying the grounds for that motion. In his view, had no motion been made, the prosecutor would not have cured the technical error in the predicate offense evidence and the gang enhancements would have been ordered stricken on appeal for insufficient evidence. The minor does not carry his weighty burden of showing that there could have been no conceivable reason for trial counsel's allegedly deficient tactical decisions.

At the close of the prosecutor's case, the predicate offense evidence was insufficient, such that the gang allegations had not been established. The insufficiency was due only to the prosecutor's inadvertence and not to any actual lack of evidence of qualifying predicate offenses committed by Norteño gang members. The minor's counsel knew or should have known that, given the opportunity, the prosecutor would be able to

cure the evidentiary defect. The initial question is whether counsel acted rationally in attempting to capitalize on the prosecutor's error by moving to dismiss the gang allegations at the close of the prosecutor's case. We think she did. While it is unlikely that predicate offense evidence would have come in during the defense case, it is possible the prosecutor would have realized on his own the insufficiency of the evidence he had submitted during that time and moved to reopen. Of course, the dismissal motion itself prompted a motion to reopen evidence. But, given that whether to reopen evidence is subject to the court's broad discretion, the minor's counsel reasonably could have concluded that the court would be less likely to exercise its discretion to reopen evidence following a prompt and meritorious dismissal motion than after the prosecutor discovered a mistake the minor's counsel overlooked or ignored.

Counsel's decision to specify the deficiency in the evidence also was a rational one. Had counsel not set forth the grounds for the motion, leaving it to the judge to divine any deficiencies in the evidence, the court could have overlooked the technical deficiency in the evidence, much as the prosecutor had done. Counsel reasonably could have concluded that identifying the shortcoming in the evidence increased the likelihood of having the motion granted.

Counsel's tactical decisions did not pan out and, with the benefit of hindsight, appear ill-advised. But because we can conceive of rational tactical purposes for the challenged decisions, the minor's claim fails.

D. Any Admission of Testimonial Hearsay was not Prejudicial

The minor contends the juvenile court erroneously permitted Detective Pinon to relate testimonial hearsay in violation of the Evidence Code and his Sixth Amendment right to confront and cross-examine witnesses. Even assuming the court erred in admitting the complained-of testimony, we conclude the minor suffered no prejudice.

1. Factual Background

Pinon testified that he conducted a recorded interview of Giovanni in a custodial setting during which Giovanni admitted that (1) "he associated with the Roosevelt subset of the Salinas East Market gang"; (2) he "was upset about the pepper spraying and wanted someone called to come back and shoot . . . the security guard"; and (3) to that end, he had someone else call Chuchin. The minor's counsel objected to the admission of any statement made by Giovanni on hearsay and confrontation clause grounds.

2. Legal Principles

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (*Id*., subd. (b).)

In *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*), our Supreme Court held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." The court defined case-specific facts as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) The court rejected as illogical the proposition that such "statements are not being admitted for their truth" and "disapprove[d its] prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id*. at p. 686 and fn. 13.) The court was persuaded to abandon its prior reliance on "the premise that expert testimony giving case-specific information does not relate hearsay" by "[t]he reasoning of a majority of justices in *Williams*[*v. Illinois* (2012) 567 U.S. 50, which] call[ed that premise] into question . . . ." (*Id*. at p. 683; *id*. at p. 684 ["We find persuasive the reasoning of a majority of justices

in *Williams*"]; *Williams* [considering the admissibility of expert testimony in appeal following bench trial for rape].)

The "improper admission of hearsay . . . constitute[s] statutory error under the Evidence Code." (*Sanchez, supra*, 63 Cal.4th at p. 685.) The standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), under which an error is prejudicial if it is "reasonably probable that a result more favorable to" defendant would have been reached in its absence, applies to such state law errors. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].)

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " (*Crawford v. Washington* (2004) 541 U.S. 36, 42.) In *Crawford*, the United States Supreme Court held that the admission of "testimonial" hearsay violates a criminal defendant's confrontation rights unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*People v. Leon* (2015) 61 Cal.4th 569, 602-603.) "Although the Supreme Court has not settled on a clear definition of what makes a statement testimonial, [our state Supreme Court has] discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' [Citation.] Second, the primary purpose of the statement must 'pertain[ ] in some fashion to a criminal prosecution.' [Citation.]" (*Id*. at p. 603.) The improper admission of testimonial hearsay violates the Confrontation Clause of the Sixth Amendment; the harmless-beyond-a-reasonable-doubt test for prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 applies to such constitutional errors.

3. Analysis

We shall assume Giovanni's statements were testimonial hearsay, such that their admission violated the Evidence Code and the Sixth Amendment, and consider whether the minor suffered prejudice. Because we assume a constitutional error, the inquiry is

whether the Attorney General has demonstrated, beyond a reasonable doubt, that Giovanni's statements did not contribute to the outcome of the jurisdictional hearing. He has.

Giovanni's statements were not necessary to prove the gang allegations. Giovanni told Pinon that he belonged to the Roosevelt subset of the Salinas East Market gang. The prosecutor never connected that gang to the larger Norteño gang that he theorized the minor sought to benefit in committing the charged offenses. Accordingly, Pinon's testimony about Giovanni's statements simply were not relevant to the gang allegations. Instead, those allegations were proved by the minor's own statements to police, at the hearing, and—most importantly—at the time of the offenses.

Giovanni's admission that he ordered a shooting as a result of the altercation between the minor and the security guards was inflammatory and may have been prejudicial in the context of a jury trial. But we have no doubt that the juvenile court judge was not improperly influenced by that evidence.

E. Sufficiency of the Evidence Supporting the True Finding as to Criminal Threats

Finally, the minor argues that the juvenile court's finding that he made criminal threats in violation of section 422 is not supported by sufficient evidence.

1. Legal Principles and Standard of Review

"The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction. In either type of case, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605, fn. omitted.)

"In order to prove a violation of section 422, the prosecution must establish . . . : (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).)

"[A]ll of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422[,] . . . [including] subsequent actions taken by the defendant." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013 (*Solis*).) Accordingly, "a statement the victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant . . . ." (*Id.* at p. 1014.)

2. Analysis

The minor contends there was insufficient evidence as to the fifth element—that "a 'reasonable' person would have understood [his] statements as a 'grav[e]' and 'immediate' threat of death or great bodily injury."

The minor angrily yelled that he knew who the security guards were and where they lived, and that he was coming back. At the same time, he invoked the name of a violent street gang. The minor was still handcuffed when he made these statements. Once the handcuffs were removed, he made an aggressive move toward Brian, whom he

previously had punched in the face. In that context, Brian's professed fear was objectively reasonable.

That Brian did not consider the minor's statements to be threats "at the moment" they were made is not exonerating. As noted above, "a statement the victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant . . . ." (*Solis*, *supra*, 90 Cal.App.4th at p. 1014.) The minor notes that Brian did not immediately report his statements to police, and that Brian failed to mention all of the threatening statements the first time he spoke with police.[8] In the context of this case, those facts do not support the minor's theory that his statements were not objectively threatening. The guards were dealing with a large, unruly crowd. Within an hour of the minor's departure there was a deadly shooting at the party, which apparently was the focus of the ensuing investigation.

Richard heard some of the minor's threats and did not take them seriously at the time they were made. A third security guard likewise did not take the threats seriously, explaining that he is regularly threatened in his role as a security guard. That two bystanders did not subjectively experience sustained fear does not mean Brian's fear was objectively unreasonable. (See *Toledo*, *supra*, 26 Cal.4th at p. 231 [noting the possibility that a threat may "not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear . . . ."].)

III. DISPOSITION

The order is affirmed.

[8] As an aside, we note that these facts seem more relevant to whether Brian subjectively experienced sustained fear, an element of section 422 that the minor does not challenge.

_____

ELIA, J.

WE CONCUR:

_____

GREENWOOD, P. J.

_____

PREMO, J.

People v. G.C.
H046054